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Date: February 11, 2015

To: Members of the Committee on Finance, Audit and Personnel

cc: Chairwoman Dimitrijevic
All Supervisors
Kelly Bablitch
Stephen Cady
Janelle Jensen

From: Paul Bargren PB
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Re: New Civil Service Rule VIII

At its meeting of January 29, 2015, your Honorable Committee requested information about the legal and procedural basis upon which the Civil Service Commission adopted its revised Rule VIII, on October 1, 2014. As I earlier advised, Rule VIII has had the effect of superseding some aspects of the "status quo" provisions adopted by the County Board as Milwaukee County General Ordinances 17.013-.018.

Background

As explained by the Department of Human Resources, "under previous rules, layoffs for non-represented classified employees could be based on factors such as job performance, attendance, seniority, ability to fund a position, the need to retain staff with specific skill sets, or a combination." DHR December 19, 2014, Report to Finance Committee. With the adoption of revised Rule VIII, "those criteria will now be applied to classified staff countywide." *Id.* Until the Rule change, layoffs and callbacks of classified employees who had been in bargaining units until the state law changes in 2011 were handled according to seniority and bumping rules set out in the "status quo" ordinances. DHR states in its Report that under Rule VIII, the County will

> establish standardized evaluative criteria to move beyond seniority-based employment decisions and will no longer 'bump' a less-senior employee in order to place a laid-off employee. Additionally, employees and departments will not be required to accept cross-functional or cross-departmental placements resulting from a layoff.

Analysis

The Civil Service Rules arise from a statutory scheme that trumps any conflicting procedures set out by ordinance. *See, e.g., DeRosso Landfill Co. Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770, 773 (1996) ("where the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith").

By statute, Milwaukee County is subject to a Civil Service system. § 63.01(1), Stats. The members of the Civil Service Commission are given the statutory authority to "prepare and adopt such rules and regulations to carry out the provisions of [the Civil Service system] as in their judgment shall be adapted to secure the best service for the county…" § 63.02(1), Stats.

A core function of the Civil Service Commission is the oversight of dismissals of employees. § 63.10(1), Stats. Layoffs are a form of dismissal. Thus, the Commission has the statutory authority to adopt rules governing layoffs, and any such rules preempt inconsistent county ordinances.

However, the statutes also allow for a collective bargaining agreement between the County and a labor organization to include provisions that will supersede the statutory Civil Service rules "with respect to employees covered by the agreement while the agreement is in effect." § 63.10(3), Stats. Thus, historically, Milwaukee County had addressed layoff procedures for represented employees in its collective bargaining agreements with DC 48 and other unions rather than addressing layoffs for those employees with civil service rules.

That became impossible after the Legislature enacted 2011 Act 10 and 2011 Act 32 (collectively "Act 10"), because those Acts limited the scope of general public employee union contracts to wages only.[1] (Public safety unions are still allowed to bargain over terms and conditions of employment, including Commission rules. *See* § 111.70(1), Stats.) After Act 10, the County and general employee labor unions can no longer use the statutory exception in §63.10(3) to modify Commission rules through a collective bargaining agreement.

The County Board attempted to retain certain DC 48 and other union contract provisions by adopting the status quo ordinances in 2012 and 2013. At the time, there was some authority for allowing the ordinance provisions to stand, since the legal status of Act 10 arguably was unsettled. Circuit Judge Colas in Dane County had issued rulings attacking the constitutionality of Act 10 and enjoining its enforcement. It could be argued that the status quo ordinances were a way to incorporate labor contract provisions into County practice while the legality of Act 10 was in dispute, indirectly achieving what § 63.10(3) would have permitted the County and a union to agree to do if a higher court sided with Judge Colas. That was the basis of my statement to the Board in December 2013 that the status quo ordinances, which were drafted as to form by my Office, were consistent with state law at that point.

That changed on July 31, 2014, however, when the Wisconsin Supreme Court issued its decision in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 3, 851 N.W.2d 337, stating, "We now uphold Act 10 in its entirety."

With the validity of Act 10 now certain, there is no longer any basis for the notion that former labor contract provisions can be incorporated into ordinance if they are in conflict with Civil Service Rules.

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[1] Indeed, DC 48 did not recertify so there was no DC 48 contract at all.

That is, the controlling authority as to general municipal employees is now clearly the Civil Service Commission statute, which gives the Commission (not the County Board) authority over policies related to the Civil Service system, including over dismissals and how they are to be handled. §§ 63.02(1), 63.10(1), Stats. Inconsistent ordinances are invalid. When revised Rule VIII adopted by the Civil Service Commission on October 1, 2014, became effective, the inconsistent provisions of the status quo ordinances were superseded.

Two related question were posed during the Finance Committee discussion: Can the County Board prevent the Civil Service Commission from making changes to the Civil Service rules? Or can the County Board block the Human Resources department or director from proposing changes to the Rules, given MCO § 33.05?

First, by statute, the authority to make civil service rules belongs strictly to the Commission, not to the County Board. *See* § 63.02(1). The County Board cannot attempt to block the Commission from making rules.

Second, as to HR's role, MCO § 33.05 states in relevant part as follows:

> No new civil service rule or modification or amendment to an existing civil service rule shall be submitted by the director of human resources, or other department head or employe, to the civil service commission for consideration until after the county board has completed a review of the new rule or amendment, and the county executive has acted on the county board action.

Notwithstanding this ordinance provision, the Human Resources Director (directly or through the HR department) can submit proposed rules changes directly to the Civil Service Commission without submitting them first to the County Board.

The Civil Service director of personnel, who is also the County HR director, is to "perform such other duties as the commission may from time to time prescribe." § 63.02(2), Stats. Civil Service Rule XI.4 contemplates that the Commission expects assistance from the director in rulemaking. The Commission can expect that assistance regardless of local ordinance.

Also, MCO § 33.05 predates Act 14. Under Act 14, the County Board "may not exercise day-to-day control of any county department or subunit" or "give instructions or orders to any subordinate of the county executive." § 59.794(3)(a), (c). Requiring the HR director to bring Civil Service rules changes to the County Board before taking them to the Commission is contrary to this new statutory directive.